

Internal Revenue Service  
**memorandum**

CC:TL-N-6954-88

Br4:JTChalhoub

date: JUL 13 1988

to: District Counsel [REDACTED]

from: Director, Tax Litigation Division CC:TL

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subject: [REDACTED]  
Technical Advice Request - Appealable Order

This is in response to your request for technical advice, dated June 8, 1988, in the subject case.

ISSUE

All other issues in the case having been agreed to by the parties and the Court having authorized the parties by order to file "a stipulation of settlement with the Court," what is the most practical and efficient method of entering a final decision that would permit the petitioner to appeal an earlier order by Special Trial Judge [REDACTED] dated [REDACTED] without violating the proscription against appeal of a consent decision.

CONCLUSION

There are many approaches to reaching a final appealable decision including your proposal and Special Trial Judge [REDACTED]'s proposal to take evidence in a motion for reconsideration of the order. However, we recommend against any proposal to reopen the record to take testimony or revisit that part of Judge [REDACTED]'s order discussing the legal authority of respondent's trial counsel to make a settlement. (Order p. 9) For the reasons explained in more detail below, we recommend respondent file a motion to enter decision for an amount of tax which includes the claim for an increased deficiency that relates to the [REDACTED] issue at [REDACTED] percent. The taxpayer's counsel should endorse the motion "no objection". The motion should be accompanied by a stipulation of settled issues that is silent on the disposition of the [REDACTED] issue. Such silence leaves no room for the Ninth Circuit to rule the taxpayer is appealing from a consent decision. Nor is there reason for the Tax Court to reconsider Judge [REDACTED]'s Order by taking any testimony. With a no objection, the record reflects the Tax Court's decision (which is appealable) rather than an agreement of the parties with respect to the increased deficiency under the [REDACTED] issue.

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### FACTS

A statutory notice of deficiency was issued by the District Director, [REDACTED], on [REDACTED]. A timely petition was filed. The adjustments in the notice of deficiency were as follows:

Increased Interest Income - \$ [REDACTED]  
Disallowed Legal Expenses - \$ [REDACTED]  
Disallowed Claimed Exemptions ( ) - \$ [REDACTED]

The deficiency in income tax for [REDACTED] was \$ [REDACTED] based on the foregoing adjustments. While working the docketed "S" case, the Appeals Officer in [REDACTED] became aware of a substantial issue that was not included in the notice of deficiency. The [REDACTED] partnership adjustment was \$ [REDACTED] and would have generated an increase in the notice of deficiency of \$ [REDACTED]. The issue was brought to the attention of a District Counsel Trial Attorney in [REDACTED] who contacted petitioner's then counsel, [REDACTED], on [REDACTED], to advise him of respondent's plan to file a motion for leave to file an answer, to remove "S" designation, and to claim a \$ [REDACTED] increased deficiency.

At some time shortly after learning of the [REDACTED] issue, respondent's trial counsel was directed by his supervisor to inform the [REDACTED] project coordinator that he had a case involving that issue and to discuss disposition of the case with the project coordinator. Whether the conversation with the project coordinator took place before [REDACTED], or shortly thereafter, is not known at this time since respondent's trial counsel is no longer with the office. What we have been able to learn is that a conversation did take place with the [REDACTED] project coordinator, and from that conversation, the trial attorney came to the conclusion that respondent did not want to try the [REDACTED] partnership issue if respondent had to assume a burden of proof in the claim for an increased deficiency. This conclusion was not a correct interpretation of the conversation with the project coordinator. However, acting upon that erroneous conclusion, respondent's trial counsel prepared settlement documents for \$ [REDACTED] with a signature line for the Assistant District Counsel authorized to execute decisions for the Chief Counsel. Those documents were sent to petitioner's counsel accompanied by a letter, dated [REDACTED], from respondent's trial attorney confirming acceptance of the settlement based upon the stipulated deficiency of [REDACTED]. The proposed settlement documents were immediately signed by petitioner's counsel and returned to the trial attorney on [REDACTED].

The proposed settlement was rejected as unauthorized by the trial attorney's supervisor when it was presented for his signature. On [REDACTED], respondent's trial counsel

telephoned petitioner's counsel to advise him that the proposed settlement was unacceptable and that a motion for leave to file an answer and claim the increased deficiency would be filed. Such motion was filed with the Court on [REDACTED] accompanied by petitioner's Motion for Entry of Decision pursuant to Agreed Settlement. By Order and Memorandum Sur Order, dated [REDACTED], Special Trial Judge, [REDACTED], granted respondent's motion for leave to file answer, directed that "S" status be stricken from the docket number, and denied petitioner's Motion for Entry of Decision.

After the answer was filed, the case was transferred from District Counsel, [REDACTED], to District Counsel, [REDACTED]. Petitioner engaged new trial counsel and the prior counsel withdrew. Because the case involved a [REDACTED] tax shelter, the case was assigned to Special Trial Judge [REDACTED] and trial was scheduled for [REDACTED] on [REDACTED].

Discussions were held with new trial counsel. Pursuant to such discussions, District Counsel believed petitioner would move for reconsideration of Judge [REDACTED]'s order and ask Judge [REDACTED] to certify the reconsidered order as interlocutory, so the taxpayer might appeal to the Ninth Circuit. On [REDACTED], Judge [REDACTED] held a second pretrial hearing at which he declined to certify Judge [REDACTED]'s order for interlocutory appeal, but expressed an interest in taking testimony on who has authority to settle a case. We are informed that petitioner's new trial counsel does not wish to try the [REDACTED] issue on the merits. However, petitioner's counsel will agree to a [REDACTED] smaller deficiency on the [REDACTED] issue if he can preserve his right to appeal Judge [REDACTED]'s order..

#### JUDGE [REDACTED]'S PROPOSAL

At the pretrial hearing [REDACTED], Judge [REDACTED] proposed that a trial be held on a minor issue, e.g., the exemptions issue, and that all other issues be stipulated including the [REDACTED] issue. He believes this will allow him to take testimony concerning the [REDACTED] "settlement" pursuant to petitioner's motion to reconsider Judge Pate's order. In principle, the parties were in agreement that such could be done. A stipulation of settled issues is due to be filed by [REDACTED] with trial scheduled for early [REDACTED].

#### DISTRICT COUNSEL'S PROPOSAL

You propose to file a stipulation of settled issues that includes all the issues in the case, including the exemption issue, but specifically excludes by addendum the right of either party to appeal a Motion for Reconsideration of Judge [REDACTED]'s order. Again, this would permit the record to be opened for taking testimony on the [REDACTED] "settlement".

### DISCUSSION

Although the parties have agreed, in principle, to allow Judge [REDACTED] to take testimony on reconsideration of Judge [REDACTED]'s order, dated [REDACTED], the only purpose of doing so is to preserve appeal of that order for the petitioner. We are concerned about two matters in the proposal. First, it has been proposed that a stipulation of settled issues be filed that includes a stipulation of settlement of the [REDACTED] issue with a [REDACTED] concession. You have called our attention to Tapper v. Commissioner, 766 F.2d 976 (9th Cir. 1985) and White v. Commissioner, 776 F.2d 976 (11th Cir. 1985). Both cases stand for the proposition that a consent decision cannot be appealed. The exceptions to the general rule are that the parties really did not consent or that the Court lacked subject matter jurisdiction. While it is arguable that a stipulation of settled issues does not include Judge [REDACTED]'s order when it is specifically excluded, we believe that settlement of the [REDACTED] issue also, arguably, could be considered a consent decision to Judge [REDACTED]'s order. It is uncontested that such order provided the nexus for claiming the increased deficiency on the [REDACTED] issue. Both your proposal and Judge [REDACTED]'s proposal are identical on stipulating settlement of the [REDACTED] issue. The only difference in the proposals is Judge [REDACTED]'s pretext of trying the exemption issue, in order to get the case to trial.


Second, we see no useful purpose to be served in reopening the record to take testimony on the authority of respondent's attorneys to settle cases. Such testimony, while expositive of District Counsel checks and balances may also prove quite embarrassing to the office. If the taking of such testimony were the only method of preserving the right to appeal, our response would be that case law is on our side and we would have no objection to your proposal.

Unless the taxpayer objects to what we propose or Judge [REDACTED] is not disposed to reverse himself on reconsidering Judge [REDACTED]'s order with an evidentiary hearing, we recommend the following action to reach a final decision that preserves the right of appeal. We recommend you indicate the advantages to petitioner in the saving of legal fees to the taxpayer by not requiring a court hearing to take testimony. Judge [REDACTED]'s order will be appealable, with or without testimony, if the [REDACTED] issue is not stipulated as being settled. Judge [REDACTED]'s order grants respondent's motion for leave to file an answer claiming an increased deficiency for the [REDACTED] adjustment. Judge [REDACTED]'s order also denies petitioner's motion for entry of decision on the so-called [REDACTED] "settlement". All of the documents, including the letter of [REDACTED], from respondent's trial counsel, are in the record that would go to the Ninth Circuit on appeal.

We recommend you file a stipulation of settled issues that does not include the [REDACTED] issue. However, you may include the lesser amount, [REDACTED] of the claim for increased deficiency, when filing a motion for entry of decision based on the "settlement" of that amount. The motion for entry of decision (accompanied by the stipulation of settled issues) should be endorsed, no objection, by the petitioner's counsel. The significance of a no objection is that petitioner chooses not to mount a defense or to prove his case that there is no deficiency. It does not mean the petitioner consents to the decision against him. A simplistic analogy might be to consider the effect of a "nolo" plea in a criminal case. With the filing of a no objection, the taxpayer is permitting the Tax Court to enter a final decision without having stipulated or consented to the decision. It is still up to the Tax Court to take action by granting or denying a motion, rather than signing a decision, prepared by the parties pursuant to their stipulation of consent. If you have any questions, please call Joseph T. Chalhoub, FTS 566-3345.

MARLENE GROSS  
Director

By:

  
HENRY G. SALAMY  
Chief, Branch No. 4  
Tax Litigation Division